

HIGH COURT OF UTTARANCHAL AT-NAINITAL.

Reserved

Writ Petition No. 577 (M/B) of 2001

Maharaj Kumar @ Anil Kumar,
S/o Sri Ram Saroop
And 5 others. Petitioners.

Vs.

Lake Development Authority, Nainital
And two others. ... Respondents.

Ms. Seema Sirohi, Advocate for the petitioners.
Mr. U.K. Uniyal, learned Advocate for the L.D.A.
Mr. Sharad Sharma, learned Advocate for Municipal Board.

Coram:- Hon'ble M.M. Ghildiyal, J.
Hon'ble Rajesh Tandon, J.

(Delivered by Hon'ble Rajesh Tandon, J.)

Heard Ms. Seema Sirohi, learned counsel for the petitioners, Sri U.K. Uniyal, learned counsel for L.D.A. and Sri Sharad Sharma, learned counsel for Municipal Board, Nainital.

Writ petition was filed by the petitioners praying for a writ, order or directions in the nature of mandamus directing the respondents not to demolish the shops of the petitioners except in accordance with law.

During the pendency of the writ petition, the shops were demolished, as such, by way of amendment in the prayer clause the petitioners have prayed for the issue of a writ, order or direction in the nature of mandamus directing the respondents to provide alternative place to the petitioners in Nainital where they may construct their shops and carry on their business.

The petitioner no. 1, namely, Depak Singh Bisht moved withdrawal application no. 1556 of 2001 which was allowed, therefore, name of the petitioner no. 1 was deleted vide Court's order dated 19.03.2004.

According to the petitioners they were carrying on their business for the last several years near Band Stand/Boat Stand and Boat House Club/Boat Stand and regular rent was being paid to the City Board Nainital/Municipality, City Board, Nainital.

From time to time various orders were passed for providing alternative accommodation. One of the order passed by this Court on 28th November 2003 was to the following effect:-

“Pursuant to our order dated 7th November 2003, District Magistrate will inform us on next Friday i.e. 5th December 2003, as to what steps he has taken with regard to the alternate sites suggested by the Nagar Palika located adjacent to the New Club, Bhuita Market. We are directing the District Administration to be made party respondent to this application. Learned Chief Standing Counsel Mr. Tewari also states that he will take the instructions from the District Administration. The matter concerns tin-sheds of the petitioners, which were demolished on 6th July 2001 and in which case, this Court had suggested giving of alternate sites to the occupants.

List the matter on next Friday i.e. 5th December 2003.”

In application no. 7768/2003 the petitioners have stated in paragraphs nos. 3 & 4 as under:-

3. That the Nagar Palika Parishad considered alternative places and after considering various places, the Nagar Palika Parishad passed an order for rehabilitating the petitioners/applicants near New Club Tibbati Market. Information about the same was also sent to District Magistrate Nainital on 27.03.2002.

4. That on 24.04.2003 this Hon’ble Court again orally directed the Nagar Palika parishad, Nainital to give alternative accommodation to the petitioners/ applicant at the place where Municipal Board had already decided vide order dated 27.03.2002 (i.e. near new club/Tibbati Market).”

Annexed with the affidavit of application no. 3077 of 2002, there is an order of Nagar Palika Parishad, Nainital dated 14.05.2002, where the Nagar Palika has passed the following order:-

“इस कार्यालय के पत्रांक: मैमो-विविध/ 15-18 दिनांक 11.5.2002 द्वारा आपको दिनांक 13.5.2002 को लॉटरी पद्धति से दुकान आवंटन हेतु बुलाया गया था। आपकी प्रतीक्षा आवंटन समिति द्वारा 1:00 बजे से 3:00 बजे तक की गयी थी। किन्तु आप उक्त समय पर उपस्थित नहीं हुए। जिसके कारण आवंटन की कार्यवाही स्थगित की गयी। अतः न्यायहित में समिति द्वारा पुनः आपको एक अवसर दिनांक 16.5.2002 को सायं 4:00 बजे, नगरपालिका परिषद नैनीताल के कार्यालय में आवंटन लॉटरी पद्धति से उपस्थित होने हेतु सूचना दी जाती है।”

Till date, it appears, no decision has taken place by the authorities concerned.

The petitioners have suggested the following alternative places for construction of shops:-

1. Near Thandi Sarak, Mallital, Nainital,
2. Tibbati Market, Near New Club, Mallital, Nainital,
3. Near Boar House Club, Mallital, Nainital,

Admittedly, the petitioners were Hawkers, but the street trading is also a part of the livelihood as defined under Article 21A of the Constitution of India. Pavement Hawkers have a right to carry on trade or business. In Halsbury's laws of England Fourth edition, Volume 40 the street trading has been defined in paragraph 426 and 428 the same has been motioned in the ALJ 1989 Vol-II Supreme Court Cases 1988, paragraph 28 is quoted below:-

“Street trading is an age-old vocation adopted by human beings to earn living. In the olden days the venue of trading and business has always been the public streets but, in the course of time fairs, markets, bazaars and more recently big shopping complexes and fashionable plazas having come up. In spite of this evolution in business and trade patterns the ‘street trading’ is accepted as one of the legitimate modes of earning livelihood even in the most affluent countries of the world. In England ‘street trading’ has been regulated by various Acts of Parliament, Paras 425 to 448 of Halsbury's Laws of England. Fourth edition, Volume 40 deal with this subject. Paras 427 to 430 pertain to ‘street trading’ in districts as regulated by the provisions of Local Government (Miscellaneous Provisions) Act, 1982 Paras 427 and 428 are reproduced as under:-

427. Adoption of street trading code and designation of streets. A district council may resolve that the street trading code is to apply to its district as from a specified day.

Where it has done so, it may by resolution designate any street in its district as a ‘prohibited street’ in which street trading is prohibited a ‘licence street’ in which street trading is prohibited without a licence granted by the district council, or a ‘consent street’ in which street trading is prohibited without its consent.”

Further, in paragraph 33 relying upon the judgment in Bombay Hawkers' Union Vs. Bombay Municipal Corporation (1985) 3 SCC 528 (AIR 1985 SC 1206), the following observation have been made:-

“In Bombay Hawkers' Union Vs. Bombay Municipal Corporation (1985) 3 SCC 528 (AIR 1985 SC 1206), this court suggested that schemes be framed to regulate the hawking business by creating hawking and non-hawking zones. Again in Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38, this Court observed as under (at p. 44 of AIR).

We feel that the Municipal Corporation authorities in consultation with the Delhi Development Authority should endeavor to find a solution on the lines as suggested in Bombay Hawkar's Union i.e. by creating Hawking and Non-hawking Zones and shifting the pavement squatters to areas other than Non-hawking Zones. The authority in devising a scheme must endeavour to achieve a twin object viz. to preserve and maintain the beauty and the grandeur of this great historic city of Delhi from an aesthetic point of view, by reducing congestion on the public streets and removing all

encroachments which cause obstructions to the free flow of traffic, and rehabilitate those unfortunate persons who by force or circumstances, are made to ply their trade or business on pavement of public streets.

Street Trading being a fundamental right has to be made available to the citizens, subject to Article 19(6) of the Constitution. It is within the domain of the State to make any law imposing reasonable restriction in the interest of general public. This can be done by an enactment on the same lines as in England or by any other law permissible under Article 19(6) of the Constitution. In spite of repeated suggestions by this Court nothing has been done in this respect. Since a citizen has no right to choose a particular place in any street for trading, it is for the State to designate the streets and earmark the places from where street trading can be done. In action on the part of the State would result in negating the fundamental right of the citizens. It is expected that the State will do the needful in this respect within a reasonable time failing which it would be left to the courts to protect the rights of the citizens.

In 1989 Allahabad Rent Cases vol. 2 page 226, the Apex Court in *Bombay Mineral and Allied Industries Employees Union and Bombay Coal Workers Union Vs. Chairman Bombay Port Trust and others* has observed as under:-

“It was contended by Mr. Bhandare, learned Counsel for the petitioners that although the cut off date was fixed as 01.01.1981, we should extend the cut off date in view of the time which has gone by. He further contended that there was a policy of the State of Maharashtra not to evict unauthorized occupants on the public lands except after providing them alternative accommodation. We are unable to accept the submissions of Mr. Bhandare. Once the cut off date has been fixed by this Court by the aforesaid order, there is no basis for extending the cut off date merely because time has gone by since that order because that would render the entire task given to the Commission futile. Moreover, doing so would run counter to the intention of this Court in making the aforesaid order which was to protect only those hutment dwellers who had been in occupation for at least two years prior to 01.01.1981. Although the policy of the Government of the State of Maharashtra was referred to, no policy statement was pointed out to us and the learned Counsel for the State of Maharashtra made it clear that no such policy would be applicable to the Bombay Port Trust lands. In view of this, we are unable to take into account any alleged policy of the State. Moreover, the Port Trust land cannot be regarded as public land as being in the occupation of the Government, either the Central Government or the State Government. Under the circumstances, we direct that the said 50 hutment dwellers along with their families who had been identified by the Commission as having occupied the said hutments for two years or more prior to the cut off date, namely, 01.01.1981, shall not be removed from their hutments and their hutments shall not be demolished except after provision of alternative sites for them. As

already directed by the earlier order, the duty of carrying out this task is imposed on the State of Maharashtra but, even if either the Central Government or the Port Trust is able to give alternative sites to these hutment dwellers, the Port Trust will be at liberty to remove these hutments.

We realize that the problem of hutment dwellers is a human problem and the removal of hutments is bound to cause an untold hardship and misery to the occupants. However, on that consideration, we cannot prevent Bombay Port Trust, from putting its land to its own use. It is not possible for this Court to say that whether there would be a greater injury to public interest by the removal of the unauthorized hutment dwellers or by preventing the Port Trust referred to earlier, although to a limited extent, we direct that even the hutments on the said lands which are not entitled to protection, will not be demolished for a period of six months from the date of signing of this order. We only hope and trust that it will be possible for the State Government or the Central Government or even the Bombay Port Trust to make some provision for providing alternative sites at least to some of these hutment dwellers, if not all. However, we make it clear that the provisions of such alternative sites is not made a condition precedent to the removal of the hutment dwellers, or the hutment in question other than those who are entitled to protection on the basis set out earlier”.

Counsel for the petitioners has also referred the judgment in *Olga Telies & others Vs. Bombay Municipal Corporation & others* reported in AIR 1986 Supreme Court 180. The relevant observation of the Apex Court is quoted below:-

We are of the opinion that the petitioners should not be evicted from the pavements, footpaths or accessory roads until one month after the conclusion of the current monsoon season, that is to say, until October 31, 1985. In the meanwhile, as explained later, steps may be taken to offer alternative pitches to the pavement dwellers who were or who happened to be censused in 1976. The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made, though we do not propose to make it a condition precedent to the removal of the encroachments committed by them.

The Apex Court in *Bombay Hawkers' Union Vs. Bombay Municipal Corporation* (1985) 3 SCC 528 (AIR 1985 SC 1206), has laid down the Hawking and Non-Hawking Zones and has directed the Commissioner to adopt the following modalities:-

- (a) As far as possible, there should be one Hawking Zone for every two contiguous Municipal Wards in Greater Bombay.*

(b) *The Non-Hawking Zones may be fixed by the Municipal Commissioner in his discretion, in consultation with the Bombay Municipal Corporation.*

(c) *In areas other than the Non-Hawking Zone, licences should be granted to the hawkers to do their business on payment of the prescribed fee. That will be without prejudice to the right of the Commissioner to extend the limits of the Non-Hawking Zones in the interests of public health, sanitation, safety, public convenience and the like.*

(d)

(e).....”

The aforesaid judgment has also been followed in the case of Maharashtra Ekta Hawkers Union and another vs. Municipal Corporation, Greater Mumbai and others, reported in 2004 (14) AIC 680 (S.C.) where the Apex Court has held as under:-

“The above authorities make it clear that the hawkers have a right under Article 19(1) (g) of the Constitution of India. This right, however, is subject to reasonable restrictions under Article 19(6). Thus hawking may not be permitted where e.g. due to narrowness of road free flow of traffic or movement of pedestrians is hindered or where for security reasons an area is required to be kept free or near hospitals, places of worship etc.....”

In view of the aforesaid facts and circumstances we are of the opinion that the hutments dwellers have to be rehabilitated.

Article 38 and 39 of the Constitution of India contains the Directive Principles of the State Policy to the following effect:-

Art. 38. “State to secure a social order for the promotion of welfare of the people:-

1. *The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social economic and political, shall inform all the institutions of the national life.*

Art. 39. The State shall, in particular, direct its policy towards securing:-

- a. *that the citizens, men and women equally, have the right to an adequate means of livelihood;*

The present matter is fully covered by the aforesaid directive principles of the State Policy.

We, therefore, form a committee in order to rehabilitate the shopkeepers/Hawkers who were evicted in the course of eviction drive in pursuance to the order passed by this Court in P.I.L. no. 566 of 2001 pertaining to Nainital City. The Committee is constituted as under:-

Chairman- Commissioner of the Division.

Members- 1. District Magistrate, Nainital,
2. Executive Engineer, P.W.D., Nainital.

We refer the matter to the constituted Committee, who shall hear the parties concerned and make policy and provide adequate accommodation expeditiously for their rehabilitation who were evicted. The entire exercise has to be made within a period of one month.

Subject to these observations, the writ petition is disposed of.

(Rajesh Tandon, J.) (M.M. Ghildiyal, J.)

May 21, 2004:
NCM:

HIGH COURT OF UTTARANCHAL AT NAINITAL.

Modification Application no. 12317/2005:

Maharaj Kumar S/o Ram Swaroop,
Mount Rose Compound, Tallital, Nainital ---Applicants.
IN

Writ Petition no. 577 (MB) 2001

Maharaj Kumar @ Anil Kumar
And 5 ors. ----Petitioners.

Versus

Lake Development Authority, Nainital
And ors. ---Respondents.

Sri V.K. Bisht, learned Sr. Advocate and Sri Manoj Sah, Advocate for the applicant/petitioners.
Sri Paresh Tripathi, learned Standing Counsel for the State.
Sri U.K. Uniyal, learned Sr. Counsel for the Lake Dev. Authority.

**Coram: Hon'ble M.M. Ghildiyal, J.
Hon'ble Rajesh Tandon, J.**

PC:

Heard Sri Manoj Shah, learned counsel for the applicant
Sri Paresh Tripathi, learned Standing Counsel for the State.
None is present for the Lake Development Authority.

2. This application has been filed by the applicant/
petitioners with the prayer that the order dated 21.05.2004
passed by this Court in writ petition no. 577 (MB) 2001 may be
modified and the respondents may be directed to provide
rehabilitation of the petitioners within a period of 10 days
where there exist a proper source of business or to provide the
same place and/ or pay of damages 1000/- per day. This is the
off suit of the main Public Interest Litigation. This Court has
already closed the main Public Interest. Further, the
applicant/petitioner has filed another writ petition for the same
cause in which some order has been passed by the learned

single Judge of this Court to consider the claim of the petitioners directing the applicant/ petitioners to apply before the Committee, which has been constituted for rehabilitation of the concerned vendors.

3. We do not inclined to pass any further order in the present modification application. The modification application is disposed of accordingly.

(Rajesh Tandon, J.)

(M.M. Ghildiyal, J.)

June 20,2006:
NCM: